
(2021) 07 DEL CK 0174

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM.) No. 180 Of 2021,
Miscellaneous Application No. 7353, 7354, 7355, 7356, 7357 Of 2021

GAIL (India) Limited

APPELLANT

Vs

Bansal Infratech Synergies Limited

RESPONDENT

Date of Decision : 27-07-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 11(6), 34

Citation : (2021) 07 DEL CK 0174

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Ngangam Junior Luwang, Mayank Garg, Divyakant Lahoti, Parikshit Ahuja

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. GAIL (India) Limited (hereinafter "GAIL") has filed the present petition impugning an arbitral award dated 10.12.2020 (hereinafter "the impugned award") rendered by an Arbitral Tribunal constituted by Justice (Retd.) Badar Durrez Ahmed as the Sole Arbitrator. The said award was rendered in respect of disputes that had arisen between the parties in connection with the contract for "Civil and Structural and U/G Piping Works for LLDPE/HDPE at GAIL's Petrochemical Complex II at Pata, Uttar Pradesh (hereinafter "the Project").
2. GAIL had appointed Engineers India Limited (EIL) as the consultant for implementation of the Project. EIL invited bids for the Project on behalf of GAIL and the respondent had submitted its bid pursuant to the said invitation. The respondent's bid for a contract value of Rs. 63,68,27,876/- was

accepted and the same was communicated to the respondent by a Fax of Acceptance (FAO) on 08.10.2011. Subsequently, on 03.11.2011, a detailed letter of acceptance (DLOA) was issued to the respondent. The works were required to be completed within a period of eighteen months with effect from the date of issuance of the FOA; that is, by 08.04.2013. The time for completing the works was extended and the respondent finally completed the same on 31.03.2015. Thereafter, on 03.03.2016, the respondent submitted its Final Bill to EIL. The Final Bill was forwarded by EIL to GAIL and payments against the same were made on the recommendations of EIL. The last payment was made to the respondent on 17.10.2017.

3. Prior to receipt of the last payment, the respondent invoked the Arbitration Clause and issued a notice dated 12.10.2017. GAIL did not take any steps for either resolving the disputes or constituting the Arbitral Tribunal pursuant to the aforesaid notice, as according to it, there were no disputes between the parties. According to GAIL, the contract stood discharged by accord and satisfaction in view of the No Claim Certificate (hereinafter â??the NCCâ??) issued by the respondent.

4. Since GAIL did not act on the aforementioned notice for arbitration, the respondent filed a petition under Section 11(6) of the A&C Act seeking appointment of an Arbitrator. This Court allowed the said petition and by an order dated 16.04.2018, appointed the Sole Arbitrator to adjudicate the disputes between the parties.

5. The respondent filed its Statement of Claims before the Arbitral Tribunal, inter alia, raising several claims. The same are briefly described below:

5.1 Claim No. 1: a sum of Rs. 27,90,574/- including service tax of Rs. 69,762/- plus interest at the rate of 19.75% per annum. An amount equivalent to

0.5% of the Running Account (RA) bills submitted by the respondent had been deducted towards water charges. The respondent claimed the said

amount on account of sums deducted by GAIL as deduction on account of water charges. The respondent claimed that GAIL had failed to comply

with its obligations to supply water to the respondent for seven months from the beginning of the contract. And, since it was not supplied any water for

construction, the respondent had to make its own arrangements for timely completion of the project. Thus, the amounts deducted from its RA bills on

account of water charges were liable to be refunded with interest.

5.2 Claim No. 2: the respondent claimed reimbursement for structural steel and allied material, which according to the respondent had been illegally treated as scrap. The respondent claimed that it was entitled to 128.846 metric tons (MTs) of structural steel that was brought at site or payment in lieu thereof. According to the respondent, it had brought 1167.55 MTs of structural steel at site. GAIL/EIL accepted that 1033.52 MTs of structural steel had been utilized in the Project; and the balance 128.846 MTs of structural steel was treated as scrap. The respondent claimed that 128.846 MTs of structural steel was not scrap as claimed by GAIL and it could not retain the same because it was not part of the material that was paid for by GAIL.

5.3 Claim No. 3: a sum of Rs. 35,77,195/- along with interest at the rate of 19.75% per annum. An amount of Rs. 35,77,195/- was deducted by GAIL while clearing the Final Bill towards risk and cost. The respondent claimed that in terms of the contract no communication or correspondence from GAIL took place regarding the risk and cost of offloading work/part of work awarded to the respondent, to another contractor. The respondent further claimed that the imposition of risk and cost by GAIL was an afterthought as the same was imposed only at the time of clearing the Final Bill.

5.4 Claim No. 4: The respondent claimed a sum of Rs. 1,12,88,745/-(Rupees One Crore Twelve Lakhs Eight-Eight Thousand Seven Hundred and Forty-Five only) as compensation for extended stay at the site. The respondent claimed that the delay of 23 months in completion of the Project was caused for reasons attributable to GAIL/EIL and the respondent was liable to be compensated for the same. The respondent claimed that in terms of Clause 7 of the DLOA, the respondent was liable to be compensated at the rate of Rs. 4,90,815/- per month for the extended period of stay.

5.5 Claim No. 5: Interest on delayed payment. The final bill was raised by the respondent on 04.03.2016. GAIL had made payment of an amount of Rs. 1,77,56,941/- on 21.02.2017; followed by another payment of Rs. 2,72,08,141/- on 26.07.2017; and, a final payment of Rs. 9,00,000/- on 17.10.2017. The respondent claimed that in terms of Clause 92.3 of the GCC, the payments were required to be made within a period of sixty days from submission of final bill on joint measurements, however payments for the final bill was not made within the prescribed time period. The

respondent claimed interest on the delayed payment at the rate of 19.75% per annum and quantified that same at Rs. 96,56,350.54/-.

5.6 Claim No. 6: The respondent sought reimbursement of legal cost.

6. In addition to the aforesaid claims, the respondent also prayed that the Arbitral Tribunal to declare that it had issued the No Claim Certificate

(NCC) to GAIL under pressure, duress and coercion.

7. GAIL contested the maintainability of the claims raised by the respondent. It also contended that the contract between the parties was fully

discharged by accord and satisfaction as the respondent had furnished the NCC. In addition, GAIL claimed that the respondent had submitted the

Material Reconciliation Statement (hereinafter â??the MRSâ?) accepting that 128.846 MTs of structural steel deposited with GAIL, was scrap.

According to GAIL, it was not open for the respondent to raise any claims in view of the NCC, as the contract stood fully discharged. Further, in view

of the MRS submitted by the respondent, it was not open for the respondent to make any claim in respect of 128.846 MTs of steel, which it had

deposited with GAIL. In addition, GAIL contested the claims on merits as well.

8. The respondent disputed GAIL's contention that the contract in question was discharged by accord and satisfaction. It claimed that the MRS and

the NCC were invalid and had been obtained by coercion and undue influence.

9. The Arbitral Tribunal examined the evidence on record and concluded that the MRS and NCC were invalid as they were obtained by exerting

undue influence and economic coercion. In addition, the Arbitral Tribunal also found in favour of the respondent that GAIL could not rely on the NCC

to constitute a waiver on the part of the respondent as it had not complied with the conditions as stated therein. The respondent had issued the NCC,

inter alia, stating that with the receipt of the aforesaid money (referring to a sum of Rs. 5,21,14,469/-) it would have no further claims against GAIL.

However, GAIL had not fulfilled the payment condition. GAIL had paid an aggregate sum of Rs. 4,58,65,082/- against the aforesaid amount and that

too in tranches. Rs. 1,77,56,941/- had been paid after effecting recoveries which was received by the respondent on 21.02.2017. The retention amount

was released on two tranches: Rs. 2,72,08,141/- was released on 26.07.2017 and the balance Rs. 9,00,000/- was released on 17.10.2017. The amount

of Rs. 2,48,296/- deducted as water charges was not released.

10. The Arbitral Tribunal found that the amount released by GAIL fell short by Rs. 62,49,387/-. In terms of the NCC, the claims, dues, disputes and differences between the parties would be fully and finally settled on receipt of the amount of Rs. 5,21,14,469/-. Since the said amount was not paid in full, the Arbitral Tribunal held that even de hors the question of coercion and/or duress, the NCC could not constitute a waiver on the part of the respondent.

11. The Arbitral Tribunal examined the evidence relating to the respondent's claim for refund of water charges to the extent of Rs. 27,90,574/-.

After evaluating the pleading and the material available on record, the Arbitral Tribunal found that the respondent had constructed a bore well and had

drawn water for construction purposes, from the said well. The Arbitral Tribunal also examined Clause 2.3 of the GCC and Clause 4.0 of the SCC. In

terms of Clause 2.3 of the GCC, the respondent was required to make its own arrangements for water supply and GAIL was not obliged to provide

the same. However, the said Clause also provided that GAIL would endeavor to provide water at its own source. Clause 4.0 of SCC modified Clause

2.3 of GCC to the limited extent and provided for supply of water by GAIL on payment of charges as stipulated therein. The Arbitral Tribunal

interpreted both the clauses (Clause 2.3 of the GCC and Clause 4.0 of SCC) and held that in terms of Clause 2.3 of the GCC, the respondent was

required to make arrangements for its water supply; however, in the event GAIL permitted the respondent to draw water from its network, the

respondent would be charged a lumpsum amount at the rate of $\frac{1}{2}$ % (one half percent) of the contract value. The Arbitral Tribunal held that Clause

4.0 of the SCC did not entitle GAIL to charge any amount for supply of water if it had not supplied it. The Arbitral Tribunal found that there was

ample evidence to support the respondent's claim that it had not drawn water from the network of GAIL principally for two reasons. First, that the

network had not been charged. And second, that even after the network had been charged, GAIL had not specified the point from where water could

be drawn. Accordingly, the Arbitral Tribunal held that GAIL was entitled to refund the total amount of deduction made by it on account of water

charges amounting to Rs. 27,90,974/- along with interest at the rate of 10% per annum.

12. Insofar as the respondent's claim for structural steel is concerned, the Arbitral Tribunal examined the clauses of the contract and found that in terms of Clause 55.1 of the SCC, the surplus material comprising of sand, bricks, stones, aggregate and other products of dismantling temporary works, would belong to the respondent. However, no other surplus material was permitted to be removed and the same would be deemed to be the property of GAIL. But that did not entitle GAIL to claim the surplus steel, which was neither paid for nor formed a part of the Schedule of Rates (SoR).

13. The Arbitral Tribunal also noted that in terms of Clause 60.3 of the SCC, full items of works were covered under SoR and no allowances towards wastage/scrap etc. would be accounted for.

14. It was also established from the record that the respondent had brought 1167.55 MTs of structural steel at site. GAIL had not paid for SoR Item

No. S004.03.03M01 (incorporating the structural steel) in excess of 1033.521 MTs. Thus, 128.846 MTs of structural steel was required to be

accounted for. The Arbitral Tribunal found that since GAIL had not paid for the relevant SoR item in excess of 1033.521 MTs, it could not retain any

steel in excess of the said quantity. However, the Arbitral Tribunal also noted that in terms of Clause 60.3 of the SCC, no allowances were

permissible towards wastage and scrap. Thus, the respondent's claim for 128.846 MTs of structural steel was required to be reduced by the quantity

of scrap, which would have been generated. The said quantity of scrap was determined on a normative basis at 1.5% of the SoR item of 1033.521

MTs. Therefore, a further amount of 15.50 MTs (1.5% of 1033.521 MTs) was required to be adjusted from the remaining quantity of 128.846 MTs of

steel. Reducing the aforesaid quantity, the Arbitral Tribunal held that the respondent was entitled for return of 113.346 MTs of structural steel, which

admittedly had been deposited with GAIL. GAIL's contention that the said steel was scrap, was rejected by the Arbitral Tribunal after evaluating

the evidence led by both the parties. The Arbitral Tribunal further directed GAIL to return 113.346 MTs of structural steel or pay the value thereof at

the market price prevailing on the date of the award.

15. The respondent claimed an amount of Rs. 35,77,195/- which was deducted by GAIL on account of risk and cost. The Arbitral Tribunal examined

Clause 29.1 along with Clause 1.1.22 of the GCC. In terms of Clause 29.1 read with Clause 1.1.22 of the GCC, GAIL was obligated to give a written

notice to the respondent as a condition precedent before offloading any work and giving the said work to any other Contractor at the respondent's

risk and cost. GAIL submitted that written notices dated 20.03.2012, 23.04.2012, 18.05.2012 and 04.12.2012 were issued to the respondent.

16. The Arbitral Tribunal held that the respondent was entitled to refund on account of risk and cost for six reasons. First, in terms of Clause 29.1 of

the GCC, the written notice was to be provided by the "employer" only. As per the letters advanced by GAIL, the said letters were written by

EIL. The Arbitral Tribunal held that as per Clause 1.1.1 of the GCC the employer was defined to mean "GAIL (India) Ltd." and not EIL and

thus, written notices to the respondent by EIL would not constitute a written notice as contemplated under Clause 29.1 of the GCC. Second, the

Arbitral Tribunal held that it was an admitted fact that no written notice had been issued by GAIL under Clause 29.1 of the GCC which was

mandatory as per the Contract prior to deduction of an amount on account of risk and cost. Third, the four letters issued by EIL were warning letters

and were definitive enough, indicating the intention of EIL that the work will be offloaded from the respondent. Fourth, the letter dated 04.12.2012 was

issued after the risk and cost contract was awarded to the new Contractor (that is, M/s VRC Constructions) on 21.06.2012. The Tribunal held that the

process to tender for the said work would have initiated a few months prior to 21.06.2012 and thus, even the other three letters issued by EIL would

not qualify as written notices under Clause 29.1 of the GCC. Fifth, there existed no evidence regarding off-loading of work from the respondent. And

sixth, that there was no evidence that indicated that EIL had recommended GAIL to offload the work from the respondent. For the said reasons, the

Arbitral Tribunal held that the respondent was entitled to the refund of risk and cost amounting to Rs. 35,77,195/- along with interest at the rate of

10% per annum.

17. Insofar as the respondent's claim for compensation at the rate of Rs. 4,90,815/- per month for extended stay is concerned, the Arbitral Tribunal

rejected the same on two grounds. First, the Arbitral Tribunal held that the respondent had waived its right for claiming any compensation. By its letter

dated 18.06.2015, the respondent had applied for extension of time up to 31.03.2015 without any financial implication on either side. The

Arbitral Tribunal found that there was no material to establish that the said request was made under coercion or under undue influence. EIL had

acceded to the request for extension of time without the levy of PRS (Price Reduction Schedule) and therefore, it was not open for the respondent to

now claim compensation on account of extended stay.

18. Second, the Arbitral Tribunal held that compensation for extended stay would be payable in terms of the contract between the parties only if the

delay was attributable entirely to EIL/GAIL. The Arbitral Tribunal found that in the facts of the case, the delay in execution of the works was not

solely attributable to GAIL and therefore, the respondent was not entitled to the compensation as claimed.

19. The Arbitral Tribunal found that payments to the respondent had been inordinately delayed. As per Clause 92.3 of the GCC the payment under the

Final Bill was required to be made within a period of sixty days from its submission. EIL had forwarded the Final Bill to GAIL under the cover of its

letter dated 05.03.2016 after certifying the measurements but the payments were made in a piecemeal manner on various dates: Rs. 1,77,56,941 was

made on 21.02.2017; Rs. 2,72,08,141/- was made on 26.07.2017; and Rs. 9,00,000/- was made on 17.10.2017. The Tribunal held that GAIL was liable

to pay interest at the rate of 10% per annum on the delayed payment. And, the said amount of interest was quantified at Rs. 48,83,306/-.

20. In addition to the above, the Arbitral Tribunal also awarded costs in favour of the respondent, which was quantified at Rs. 19,22,106/-.

21. Mr Luwang did not contest the decision of the Arbitral Tribunal on the merits of the claims. He readily conceded that given the limited scope of

intervention under Section 34 of the A&C Act, the impugned award could not be assailed until and unless it is established that the decision of the

Arbitral Tribunal was perverse, patently illegal or otherwise falls foul of the public policy of Indian law. The claims awarded in favour of the

respondent are supported by cogent reasons, which cannot be faulted. Mr Luwang confined himself to assailing the conclusion of the Arbitral Tribunal

that the MRS and NCC had been secured by coercion. He referred to Clause 44.3 of the GCC in question and contended that EIL/GAIL could not be

faulted for demanding the NCC before processing the Final Bill as the parties had agreed that such certification would be necessary before the invoices raised by the respondent would be processed. Clause 44.3 of the GCC reads as under:

44.3 The final payment shall not become due until the CONTRACTOR delivers to the ENGINEER-IN-CHARGE a complete release or waiver of all liens arising or which may arise out of his agreement or receipt in full or certification by the CONTRACTOR in a form approved by ENGINEER-IN-CHARGE that all invoices for labour, materials, services have been paid in lien thereof and if required by the ENGINEER-IN-CHARGE in any case an affidavit that so far as the CONTRACTOR has knowledge or information the releases and receipts include all the labour and material for which a lien could be filled.

22. In addition, Mr Luwang submitted that mere bald allegation of coercion and undue influence was insufficient to establish the same. He further pointed out that the respondent had not raised any such allegations at the material time and had raised this issue only in pleadings filed before the Arbitral Tribunal. He stated that the Final Bill was submitted on 03.03.2016 and the respondent had invoked the arbitration by a notice dated 12.10.2017. The notice of arbitration also did not contain any allegation that the NCC had been secured by coercion and duress.

23. There is no cavil that a bald assertion of coercion and duress would be insufficient to sustain such an assertion. The party asserting that it had accepted a reduced payment in full and final settlement of its claims on being coerced or coming to economic duress must establish the same by sufficient material and evidence.

24. The Arbitral Tribunal had also accepted the aforesaid contention and had referred to the decisions of the Supreme Court in *Union of Indian v. Master Construction Co.*: (2011) 12 SCC 349; *National Insurance Company v. Boghara Polyfab Private Limited*: (2009) 1 SCC 267; and *Oriental Insurance Co. Ltd. v. Dicitex Furnishing Limited*: 2019 SCC OnLine 1458 and had observed as under:

26. From the said decisions it is clear that the issuance of a No Claim Certificate does not, by itself, extinguish the rights and claims of the party issuing such a certificate. If the party is able to establish duress or

coercion, then the "No Claim Certificate" issued by it would be void and its claims would have to be judged on merits. At the same time, a bald assertion of coercion or duress without any material to back such a plea would not

entitle the party who gave the "No Claim Certificate" to renege from it."

25. Bearing the aforesaid in mind, the Arbitral Tribunal had examined the material placed on record and after evaluating the same had accepted the respondent's claim that the NCC and MRS had been issued by the respondent under coercion and duress.

26. The Arbitral Tribunal noted that the works were completed on 31.03.2015 and the Final Bill (RA Bill No.30) was submitted by the respondent to

EIL on 03.03.2016. Immediately, thereafter, on 04.03.2015, the respondent was compelled to issue the NCC and sign the MRS. It was clear from the

evidence led that EIL/GAIL had refused to process the payment until the respondent submitted the NCC. Mr Luwang had not contested the finding

that EIL/GAIL had declined to process the Final Bill without the petitioner furnishing the NCC. On the contrary, he had contended that such

certification was rightly demanded by EIL as per the terms of the contract entered into between the parties and, the invoices could not be processed

without such certification.

27. The Arbitral Tribunal also found that the NCC had been issued in the format as provided by EIL. Further, the Arbitral Tribunal also observed that

the language and tenor of the NCC was loaded heavily against the respondent. There was also evidence on record that the respondent had made

repeated requests for reimbursement of water charges that were deducted from the running bills and had also requested for return of surplus

structural steel. In these circumstances, there was no reason for the respondent to give up their claims and accept the amount which was admittedly

due to it, as full and final settlement of its dues. The Arbitral Tribunal found that the respondent was compelled to submit the NCC and MRS as large

amounts due to the respondent had been withheld by GAIL and the same would not be released unless the respondent submitted the NCC and MRS

as demanded.

28. In addition to the finding that the respondent had submitted the NCC and MRS under duress and coercion, the Arbitral Tribunal also found that

GAIL could not rely on the NCC as the payments mentioned therein were not

fully discharged by GAIL at the material time. The NCC contemplated a full and final settlement of all dues on payment of an amount of Rs. 5,21,14,469/-. However, the amounts paid to the respondent fell short of the said amount by Rs. 62,49,387/-. GAIL having not paid the settled amount, could not therefore, rely on the NCC to claim that the respondent had settled all its claims and dues in terms of the NCC.

29. It is relevant to note that similar issues were also raised in respect of another contract that was awarded to the respondent simultaneously with the

award in question. The respondent was also awarded the contract for works referred to as "Civil and Structural Works" (OFFSITES).

Similar disputes (except claim no. 3 relating to deduction on account of risk and costs) had arisen between the parties in respect of the said contract as

well. These claims were also subject matter of arbitral proceedings that culminated in an arbitral award dated 10.12.2020. The said award was

impugned by GAIL in a petition filed under Section 34 of the A&C Act, being OMP (Comm) 177/2021 captioned GAIL (India) Limited v Bansal

Infratech Synergies Limited. The contentions advanced on behalf of GAIL in that petition, which are similar to the ones advanced in this matter, were

considered and rejected by this Court by a judgement dated 06.07.2021.

30. Concededly, the contentions advanced on behalf of GAIL are covered by the said decision.

31. In view of the above, the present petition is unmerited and is, accordingly dismissed. The pending applications are also disposed of.